No. 439

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

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BRIEF OF APPELLEE THE BORDEN COMPANY

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QUESTION PRESENTED

Do the facts in the record substantially support the district court's conclusion that the Borden cost study provided an adequate justification for the differences in prices charged the grocer customers named in the Government's prima facie case?

Comment

The Government's Brief* (p. 3) sets forth a third version of the "Question Presented," differing both from the version set forth in the Notice of Appeal (R. 577-8) and that set forth in the Jurisdictional Statement (p. 2). This third

* Hereinafter cited as "Br."

version of the "Question Presented" is not raised by the record, since it makes three assumptions, all of which are, as will be shown, contrary to fact:

(1) That Borden "discriminated in price in favor of chain stores, as such," when in fact there is not a scrap of evidence that Borden ever favored "chain stores" simply because they were chain stores.

(2) That Borden, having arbitrarily classified its customers, attempted to justify its discounts merely by showing differences in costs of sales and delivery between these arbitrary classes of customers, when in fact one of the purposes and results of the cost study was to test and establish the reasonableness of the "classifications"; and

(3) That Borden's cost study was solely concerned with the ascertainment of the "average cost" of selling and delivering milk to the classifications of "chain stores" and "independent stores," when in fact the collected data forming Borden's cost study shows the costs on a store-by-store basis.

STATEMENT OF THE CASE

The Statement in the Government's Brief is inadequate because (1) it fails to explain the prima facie case introduced by the Government below, which is necessary to an understanding of the issues actually presented; (2) it fails to describe how Borden's cost study was made, and limits itself to a discussion of some of the alternative calculations which can be made from the data collected by the study; and (3) it fails to give an adequate description of the calculations and analysis on which Borden relied in submitting its cost-justification defense.

1. The Government's prima facie case

After remand, and after the Government's motion to reopen the record for further evidence was granted (R. 45-50), the Government submitted two lists of Borden customers (R. 79-80). The first list named six grocery stores served by Borden's Route 25-W in March, 1955, and the second identified seven grocery stores served by Borden's Routes 181, 155, and 145 in December, 1954. Of these thirteen grocery stores, four were A&P stores, and one was a Jewel store. The remaining eight were individually owned.

The two lists showed total dollar purchases of milk products from Borden by each store for the month in question, together with the discount received. Three of the individually-owned stores received a discount of 5½%; one received 4%, and four received 3%. The lists show, as to A&P and Jewel, that these two customers each received an 8½% discount on its total purchases for its stores in the Chicago area and in other parts of Illinois, which total purchases included those made for its stores listed by the Government.

It was stipulated that Borden had in effect a "Milk Discount Schedule to Grocers" (R. 82), which offered all grocer customers the following discounts:

"Average converted units per day	% Discounts
0-24	0
25-74	2
75-149	3
150 and over	4"

The discount schedule provided that "total monthly purchases" would be "converted" into units to ascertain the applicable discount percentage, that the applicable discount

percentage would then be applied to the "total dollar purchases," and that a "discount check" would be mailed in the course of the subsequent month (*ibid.*).

This was the only "discount schedule" issued by Borden in which customers were classified. However, the Government's two lists showed that some customers were given additional discounts by individual arrangements (R. 79-80).

On June 4, 1954, Borden notified A&P by letter that it would be given a discount of 8½% effective June 1, 1954 (R. 83). A similar letter, providing for the same discount, was sent to Jewel (R. 83-4).

The lists also showed that some of Borden's largest "independent" grocer customers also received special discounts. Thus, of the eight independents listed by the Government, the three largest received a discount of 1½% in addition to the maximum of 4% provided by the discount schedule (R. 80).

The question was thus raised by the Government's prima facie case whether the special discounts of 1½% to the three largest independent customers had to be justified as against the lesser discounts given the five other independent grocers. In addition to a cost justification, Borden was prepared to offer evidence that the discount granted these particular three grocers was justified as the meeting of a competitive offer. The Government eliminated the entire issue from the case by later stipulating as follows:

> "Plaintiff does not contend in this proceeding that the added discounts of 1½% allowed by Borden . . . to store customers Schubert, Popik, and Arthur Cartan . . . are evidences of a violation of Section 2(a) of the Clayton Act as amended. Borden does not intend to offer evidence of any prices offered by Lake Valley

Dairy to Schubert, Popik, and Arthur Cartan" (R. 222-3).

The Government never inquired, nor does the record show, what other "independents" had special discount arrangements, nor the amount of such discounts. The only facts pertinent to the Government's prima facie case were that, of the eight "independents" selected by the Government as the basis of its claim of price discrimination, four had a volume sufficient to entitle them to discounts of 3% under the discount schedule, and four had a volume entitling them to discounts of 4%. However, of the latter four, the three with the largest volumes also received an additional 1½%, for a total discount of 5½% (R. 79-80).

The Government's prima facie case thus was limited to the charge that the discounts shown by the two lists of customers resulted in apparent price discriminations; and the Government's Post-Trial Brief to the District Court made this abundantly clear:

> "The Government will consider, first, the Bowman discount quotations of June, 1954, and then, the Borden discount quotations of June, 1954, and will show that a prima facie price discrimination between wholesale customers has been established" (Post-Trial Brief 4-5).*

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* The Government's Brief to this Court implies (10, fn. 5) that another price discrimination was shown to have begun in September, 1955 by the grant to A&P of "a discount over the price paid by *all* independents ranging from 7½-8 percent" and that "Borden submitted no separate cost justification for this discrimination." While these assertions are incorrect, since special discounts to independents continued to be granted (R. 77-8), the important fact is that the Government below did not base any claim on the changed fact situation presented after September, 1955, which involved many new considerations, including the loss of Jewel as a Borden customer. Borden's cost study keyed to the Government's prima facie case had been completed (R. 145) at a cost in excess of $50,000 (R. 220-1, 91), and neither party desired to complicate the issue further by requiring a study of the new situation.

2. Borden's cost study

After the two lists had been submitted to Borden, a comprehensive cost study was undertaken under the direction of J. F. Malone, District Controller of Borden's Chicago Central District, a man well qualified professionally and widely experienced in this field (R. 125-7). Malone was assisted by the certified public accounting firm of Haskins & Sells, who have been Borden's independent auditors for many years (R. 126-7), and who vouched for the accuracy of the results (R. 221-2).

Time-study men rode each of the 134 wholesale routes operated in the Chicago area for a full week (R. 145-54).* By means of a stop-watch, every activity of the drivers (called "routemen") was timed and contemporaneously recorded (R. 154). The report forms identified each customer served, the time taken by each activity performed for each customer at each location, and the number of deliveries to each location (R. 148-9, 154-63, 180). The sales to each customer location on each delivery were also recorded (R. 150-1). The appendix to this brief consists of a copy of the report forms actually completed for the customer Schubert.

The work of the drivers was broken down into forty items, which were assigned numbers and are fully described in the stipulations (R. 171-7). Items 6 through 23, including such activities as carrying milk into the store, gathering empty bottles and returned goods, and preparing sales

* The Government remarked that, as to 133 store customers who were located in scattered residential districts and were served by retail routes, "No separate time studies or calculations were made" (Br. 11, fn. 6). No one has ever contended that a cost study has to deal with every transaction and every customer; the Government's own expert considered Borden's samplings more than adequate (R. 656-8). Moreover, the cost survey covered every store named in the Government's prima facie case.

tickets, took place at the store location and hence were directly chargeable to specific stores. Two items (38 and 39), covering reports relating to chain stores, were chargeable to all chain stores on the route as a whole;* and one item (40), relating to time spent at the branch office on independent store credit matters, was directly chargeable to all independents to whom credit was extended. Items 1 through 5 and 24 through 37 were activities before and after the route trip, and time spent driving to and from the route area and between store stops. Not being wholly identifiable with or chargeable to a specific store, they constituted "indirect" or "joint" costs.

The total elapsed time spent by all drivers on these activities during the week of the study was then computed and found to be 376,864 minutes (R. 163). The total compensation paid to drivers, including fringe benefits, was also computed and found to be $29,242 (R. 163-70). Dividing this sum by the total minutes showed that the direct wage cost of drivers per minute was $.0775943—roughly, 7¾ cents (R. 170).

In this way, the direct cost of activities performed at a particular store could be computed. Eliminating time spent at non-store locations, $15,552, or more than half the total route labor costs, could be charged against specific store locations (R. 183), such as Schubert, Cartan or Popik, or the other stores on the Government's lists.

The wage costs of special deliveries, totaling $833 for the week, were also recorded in a similar fashion (R. 192-5).

* For some reason, the Government criticizes the fact that the cost of these items was allocated to the chains on a location basis, rather than a time basis (Br. 13, fn. 7). This, of course, was because the time spent could not be identified on a store-by-store basis, but would have to be allocated to each on the basis of the total number of stores or "locations" if the cost of delivery to a specific chain store location were ever of significance.

A study was also made of clerical costs incurred at the branches and at the division main office. Clerks were required to keep daily records of time spent by activities. Some of these costs (checking A&P and Jewel tickets, checking tickets of independent and non-store customers, preparation and sending of weekly centralized billings to A&P and Jewel, preparation and sending of monthly discount checks to independents, preparation and sending of discount checks to A&P and Jewel, and activities of the main office credit department relating to independents or to A&P and Jewel) could be charged directly to identifiable groups of customers (R. 197-216).

The weekly average wage costs for "solicitors" or salesmen employed by Borden with respect to the routes surveyed ($2,065) was also ascertained from the accounting records (R. 132, 134, 137).

The weekly costs of operating and maintaining the trucks used for regular and special deliveries were computed from Borden's accounting records (R. 195-7). Similarly, the loss on returned goods was also computed from such records (R. 216-7). These costs could not be identified with particular customers, and thus constituted "indirect" or "joint" costs.

Bad debt losses for six years were studied, and all were found to be due to defaults of independent store customers. Charge-offs for bad debts were reduced to a weekly average (R. 215).

A description of what had been done was then prepared in the form of a proposed stipulation. Pertinent information as to Borden's methods of operation and books of account was added, and relevant data from those accounts was included (R. 88-93, 119-226).

The stipulation describing the cost study computed and assigned "direct" costs to the specific stores or groups of

stores which incurred the costs. For example, driver's time spent at each store was charged directly to that store (R. 148-9, 171, 183), while items such as clerical expense were assigned to the appropriate group of stores (R. 203).

With respect to other items, constituting what the accountants describe as "indirect" or "joint" costs (R. 782-3), the stipulation set forth data as to the use of "locations" or "stops" as a basis of allocation. For example, since a route was made up of a given number of stores, activities of drivers at the branches before leaving in the morning and after returning at the end of the day, and time spent driving to and from the route area, were susceptible to *allocation* on the basis of the number of stores making up the route. On the other hand, time spent in driving between stores could more properly be allocated on the basis of the number of "stops" or deliveries made, since deliveries were not made every day to all stores, and more than one daily delivery was sometimes made to other stores (R. 171-2, 175-7).

The cost study itself, however, was not based on any assumption that allocations of indirect costs *had* to be made on any particular basis. The cost study merely supplied the basic data from which the indirect costs which it disclosed might be allocated in proportion to various yardsticks, such as volume, stops, locations, direct costs, or the like.

The cost study itself contained no final computation of differential costs, nor did it contain any comparison between the cost differentials and the discounts sought to be justified.

The data thus assembled, including the report forms, the sales tickets, the punched cards to which the data was transferred, and the records of clerical time, was assembled and made available to the Government as Bulk Exhibits 4 through 13 (R. 159, 163-4, 180, 192, 197, 205, 209-11).

After the cost study data was submitted to the Government, Malone, under whose supervision the cost study had been made, was cross-examined by deposition. All of the matters elicited from Malone in which the Government expressed an interest were summarized and included in the proposed stipulation (R. 125). Additional information which the Government requested was also supplied.

As this summary shows, the cost study was an attempt to find out *the actual costs of sale and delivery on a store-by-store and customer-by-customer basis.* The cost study was not based on any pre-judgment about the proper way in which customers should be grouped or classified. The data placed in evidence through the cost study provided the means by which counsel for either party, or the expert witnesses called by either party, could check the propriety or reasonableness of any classification of customers, and could ascertain whether any Borden customer or group of customers was unfairly treated by Borden.

The cost study itself required an expenditure by Borden in excess of $50,000, without reference to the time spent by Borden personnel diverted from their regular duties (R. 220-1, 91).

The conclusions which Borden contends should be drawn from the cost study were set forth in Summary Schedules I, II, and III, included in Borden's brief to the District Court, which, with the necessary explanations as to the source of the data, appear in the record (R. 581-608).

3. The expert testimony offered by the Government

The Government presented the testimony of three outside expert witnesses, Herbert F. Taggart, professor of accounting at the University of Michigan, Albert E. Sawyer, an accountant and lawyer practicing in New York City, and Otto F. Taylor, an accountant also practicing in New

York City (R. 380, 383-5, 393-4). All were men well qualified in the field. The Government also presented the testimony of Elliott B. Wooley, an economist employed by the Antitrust Division (R. 399). The direct testimony of all four men was drafted in statement form and became part of a pre-trial order (R. 380-401). Cross-examination of these four witnesses was by depositions which form part of the record (R. 687-1198).

The Government's Brief does not contain a single reference to the testimony or opinions of the four expert witnesses on which the Government relied in the District Court. The criticism of the Borden cost study on which the Government relies in this Court is not based upon the opinions of the Government's chosen experts.

Professor Taggart was Chairman, and Messrs. Taylor and Sawyer were members, of the Advisory Committee to the Federal Trade Commission on Cost Justification under the Robinson-Patman Act. The Report of that Committee (hereinafter referred to as the "Cost Justification Report") was identified as an exhibit and forms part of the record in this case (R. 762-802). Taggart, Sawyer, and Taylor all reiterated on deposition their complete agreement with the opinions expressed in this Report (R. 637, 645-9, 655, 644-8, 671, 718, 829-37, 943-8).

The Government witnesses had before them as much of the cost study as Government counsel requested them to examine (R. 689-99, 732, 812, 814-8, 928-9, 1027-8). They did not, of course, have before them the Summary Schedules in which the conclusions which Borden sought to draw from the data were later expressed.

Not a single word of criticism of Borden's classification of customers appears in the statements of Taggart, Sawyer and Taylor (R. 380-99). Both Sawyer and Taylor approved the use of a classification of customers for purposes of

cost-justification (R. 389-91, 395-7). All three expressly reaffirmed their agreement with a passage in the Cost Justification Report which expressly stated that without the power to classify customers into groups for purposes of cost analysis, "cost-justification" would be "outside the realm of practicability" and that the denial of the right to classify "would tend to make price uniformity a necessity, regardless of economies of manufacture, sale and delivery" (R. 776-7, 671, 832, 943). Sawyer expressly stated that cost justification of Borden's discounts "requires an allocation of internal costs among various classes . . . of customers" (R. 391); and Sawyer and Taylor both recognized that there was nothing inherently improper in treating "chain stores" as a class (R. 392, 396-7).

The comments by the Government's experts, outside of generalizations about cost accounting methods (R. 390-1, 395-7), related to the propriety of including drivers' "commissions" in total driver wages (R. 383, 393, 397-9), to the allocation of all "transportation costs" on a volume basis (R. 382-3, 391, 396-7), and to the supposed omission of an analysis of executive time spent on solicitation of chain store business (R. 381-2, 392-3, 397).

The supposed "omission" (based on the fact that the final form of the stipulation covering the cost study was not shown the three experts) was made up by the furnishing of additional data (R. 516-8). The problem of how so-called "transportation costs" should be allocated became moot because Borden's Summary Schedule I shows that the challenged discounts were justified by direct costs alone, without the need of allocating any of the items constituting "transportation expense" (R. 585). Summary Schedule IV similarly shows that cost justification was demonstrated no matter how drivers' so-called "commissions" were treated (R. 617).

SUMMARY SCHEDULE NO. I

COST JUSTIFICATION BASED SOLELY ON DIRECT COSTS

	TOTAL COST	CHAIN STORES	....................INI	
				....
			TOTAL	0%
DIRECT COSTS:				
1. Routemen's direct labor costs................	$17,065.24	$ 6,453.52	$ 9,266.86	$1,143.26
2. Special delivery direct labor costs..........	72.59	36.66	18.20	1.29
3. Branch office clerical salaries..............	2,355.51	649.79	1,274.55	325.66
4. Billing department...........................	466.15	356.38	42.29	12.54
5. Credit department............................	60.72	1.30	9.37	2.78
6. Accounting department........................	21.72	8.25	13.47	3.99
7. Robert F. White & Company....................	140.83		140.83	41.76
8. Tabulating department........................	57.20	12.12	45.08	
9. Bad debt losses..............................	31.58		31.42	9.32
10. Loss on returned products....................	2,213.82	1,139.20	972.87	109.65
11. Salesmen's and solicitors salaries...........	2,065.83		2,065.83	135.10
12. Total direct costs........................	$24,551.19	$ 8,657.22	$13,880.77	$1,785.35
13. SALES VOLUME.................................		$195,262.07	$98,672.52	$6,554.77
14. COST PER $100.00 OF SALES....................		$4.43	$14.07	$27.24

SUMMARY SCHEDULE NO. 1

COST JUSTIFICATION BASED SOLELY ON DIRECT COSTS

	TOTAL COST	CHAIN STORES	INDEPENDENT STORES					NON-STORE CUSTOMERS
				DISCOUNT SCHEDULE				
			TOTAL	0%	2%	3%	4%	
...	$17,065.24	$ 6,453.52	$ 9,266.86	$1,143.26	$ 3,543.24	$ 2,932.15	$ 1,648.21	$1,344.86
...	72.59	36.66	18.20	1.29	3.28	4.53	9.10	17.73
...	2,355.51	649.79	1,274.55	325.66	546.14	295.64	107.11	431.17
...	466.15	356.38	42.29	12.54	18.33	3.86	2.56	67.48
...	60.72	1.30	9.37	2.78	4.06	1.96	.57	50.05
...	21.72	8.25	13.47	3.99	5.84	2.82	.82	
...	140.83		140.83	41.76	61.04	29.51	8.52	
...	57.20	12.12	45.08		27.77	13.43	3.88	
...	31.58		31.42	9.32	13.62	6.58	1.90	.16
...	2,213.82	1,139.20	972.87	109.65	391.19	304.31	167.72	101.75
...	2,065.83		2,065.83	135.10	691.64	752.17	486.92	
...	$24,551.19	$ 8,657.22	$13,880.77	$1,785.35	$ 5,306.15	$ 4,351.96	$ 2,437.31	$2,013.20
...		$195,262.07	$98,672.52	$6,554.77	$33,051.13	$35,899.27	$23,167.35	
...		$4.43	$14.07	$27.24	$16.05	$12.12	$10.52	

Not one of these three criticisms of the Borden cost study is now being urged by the Government to this Court.

4. How Borden sought to demonstrate the cost-justification for its discounts

The Cost Justification Report, embodying the opinions of the Government's three outside experts, points out that, wherever joint or indirect costs are present, the possibility arises that several different methods of allocation are available (R. 801). A reasonable choice resulting in cost justification should not be set aside simply because another reasonable choice of an available allocation method would produce a different result (R. 801, 665, 756). Hence, as Sawyer pointed out, when it can be shown that price differentials are justified by more than one reasonable method of assigning costs, the validity of the cost-justification is greatly strengthened (R. 849-50).

In its Brief to the District Court, Borden submitted four "Summary Schedules," numbered I, II, III, and IV (R. 585, 597, 605, 617). These Summary Schedules set forth the results of *four different methods of assigning costs*, all based on the data provided by the cost study. *Under each of the four computations, Borden's discounts were fully cost-justified.*

Summary Schedule I is based primarily on *direct costs*, and does *not* depend upon debatable allocations. This schedule is, for convenience, copied on the sheet bound opposite this page in this Brief. The first eleven lines of this Schedule deal with the eleven cost elements of which the exact amount chargeable against A&P and Jewel on the one hand, and independent stores on the other, could be ascertained. These eleven cost elements were:

1. *Routemen's direct labor costs:* The cost of the minutes of the drivers spent in making deliveries at each

store individual. ***This item was more than two-thirds of the ascertainable direct costs*** **(R. 183, 191, 582-3).**

2. ***Special delivery direct labor costs:*** **The cost of the drivers' time taken at the individual store locations in making special deliveries (R. 195, 583).**

3. ***Branch office clerical salaries.*** **The total cost of certain types of clerical activities was ascertained by the cost studies. Some of these activities (such as the checking of chain store tickets) related solely to A&P and Jewel; some (such as checking other tickets) related solely to the independents or to non-store customers. Sill other activities (such as the posting sales to the company ledgers and similar bookkeeping activities) were of the kind which the Government's experts agreed should be divided on the basis of the number of separate "sales" or "stops" made—the assumption "that it takes a uniform amount of time to prepare each invoice line, regardless of the article sold or the quantity of articles represented" (R. 778-9, 203, 587-8).**

4. ***Billing department expense.*** **The activities of this department were time-studied, and the time spent on matters related to A&P and Jewel, to independents, and to non-store customers ascertained. Only $42 of this expense was chargeable to independents, and because of the small amount involved was allocated between classes of independents on a location basis (R. 202-9, 588).**

5. ***Credit department expense.*** **The total expense of this department on wholesale functions was only $61, divisible on a time basis between chains, independents, and non-store customers. The small amount of expense incurred by independents ($9) was allocated between classes on a location basis (R. 209-10, 588-9).**

6. *Accounting department expense.* The cost of supervising preparation of discount checks was divided between chains and independents on a direct time basis (R. 211, 589).

7 and 8. *Computing services and tabulating costs.* The costs of an outside computing service and of the tabulating department in compiling data necessary to the preparation of discount checks to independent stores was chargeable directly to independents, and allocated between discount classes on a location basis (R. 211-15, 589).

9. *Bad debt losses.* For six years all losses had been incurred by independents or non-store customers; the weekly average of charge-offs due to independents was allocated by classes on a location basis (R. 215, 589).

10. *Loss on returned products.* On the assumption that the amount of returned goods, store-by-store, was directly proportional to the time spent in collecting them, this cost was charged each store on the basis of this unit of measure (R. 216, 590).

11. *Salesmen's and solicitors' salaries.* These employees solicited the business of independents and did *not* solicit A&P and Jewel (R. 134). Their salaries were therefore directly chargeable to the independents as a class. On the assumption that time spent on customers was roughly proportional to the volume of the customer's business, this cost was allocated between independents on the basis of volume (R. 137, 590).

These cost elements were thus either directly chargeable to specific customers on a time basis, or were allocable on some basis universally accepted as equivalent to a direct charge.

Summary Schedule I showed that the *direct* costs of sale

and delivery per $100 of sales were $4.43 to A&P and Jewel, $14.07 to independents as a whole, $27.24 to the independents given no discount, $16.05 to the independents given a 2% discount, $12.12 to independents given a 3% discount, and $10.52 to the independents receiving a 4% discount.

In the face of these figures, *the Government in effect has admitted that the basic discount schedule has been fully cost-justified.* The only remaining issue is whether the discounts to A&P and Jewel were cost-justified. The following table, constructed from the data set forth in Summary Schedule No. I, demonstrates that in every relation the discount to A&P and Jewel was far more than cost-justified on the basis of direct costs alone (R. 592):

TABLE 1.

	Differences in costs per $100 of sales	Amount necessary to justify discount	Amount of over-justification
1. Between chain stores and independents getting no discount ($27.24 less $4.43)	$22.81	$8.50*	$14.31
2. Between chain stores and independents getting 2% discount ($16.05 less $4.43)	$11.62	$6.50	$ 5.12
3. Between chain stores and independents getting 3% discount ($12.12 less $4.43)	$ 7.69	$5.50	$ 2.19
4. Between chain stores and independents getting 4% discount ($10.52 less $4.43)	$ 6.09	$4.50	$ 1.59

* A discount of 8½% equals $8.50 on each $100 of sales.

Borden also submitted Summary Schedules II and III based upon alternative reasonable methods of allocating certain of the indirect costs of sale and delivery (R. 597, 605).

Summary Schedule II is based on the allocation of certain indirect costs having a close relation to direct costs in proportion to the distribution of direct costs (R. 597). This is a method of allocation which is frequently used by accountants and met with the approval of the Government's experts Taggart and Taylor (R. 662-3, 667-9, 801, 1037).* Summary Schedule II shows a cost-justification by a far wider margin than Summary Schedule I (cf. R. 585 with 597).

Summary Schedule III takes three items of indirect costs (routemen's indirect labor, special delivery indirect labor, and wholesale truck costs), and allocates them on the basis of number of "stops" or deliveries made (R. 605). Again, this Summary Schedule shows an even greater cost-justification than does Summary Schedule I (cf. R. 585 with 605).

Summary Schedule IV was prepared to meet the contention, founded on a misapprehension of the duties and activities of drivers, that that portion of the compensation designated under the labor contracts as "commissions" should

* The Government notes that Borden's Malone testified that such a method of allocating numerous overhead expenses would be proper (R. 135), but adds that "in fact no such allocation was made in the original Borden cost study with respect to any of these categories (R. 132)" (Br. 15). The reference was to a statement that "the cost study as set forth in this Order does not show allocations to various classifications of store customers" of certain items of expense. As stated above, Borden's cost study, as embodied in the stipulated pre-trial order, made no pretense of computing allocations which were purely arithmetical in nature and which were therefore left for argument. The Government's Brief in several passages fails to distinguish between the cost study, consisting of the data collected, and the argumentative use to be made of this data which had no place in the stipulated pre-trial order.

be allocated on the basis of volume (R. 617). This contention has not been made by the Government before this Court, since Summary Schedule IV shows that, even if this part of drivers' compensation were eliminated from the computation of direct costs, the discounts were fully cost-justified.

The Government's Brief does not seriously attack any of the premises upon which these four Summary Schedules were constructed. The Government's Brief contents itself solely with attacking Borden's "classification" of its customers. Specifically, the sole issue raised by the Government's Brief is the propriety of giving A&P and Jewel a greater discount than was given to any of the eight independents identified on the Government's list of customers (R. 79-80).

5. What the District Court Held

The District Court adopted all of the stipulated facts set forth in the pre-trial orders as part of its findings.* From these evidentiary facts, the District Court made certain ultimate findings:

1. that Borden's and Bowman's cost studies were the "products of extensive investigations" (R. 569);
2. that these cost studies "reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers" (R. 569);
3. that classification of customers by these defendants

* The Government complains that "The court did not undertake any detailed analysis of the Borden cost study or of the government's objections thereto" (Br. 19). The fact, as shown above, that the objections made by the Government's experts had either been taken care of by later evidence or were demonstrated to be of such a nature that cost justification was established even if the objections were conceded made a "detailed analysis" unnecessary.

"is not wholly arbitrary," as the Government contends (R. 570);

4. that "defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers" (R. 570);

5. that "such cost allocation is the sole reason for the alleged price discrimination" (R. 570);

6. that "the cost studies provide an adequate justification for the difference in prices" (R. 570);

7. that "plaintiff has shown no need for the exercise of the Court's equitable powers" (R. 572).

The sole issue in this case is whether these findings are supported by substantial evidence.

SUMMARY OF ARGUMENT

The Government's prima facie case showed that Borden offered all grocer customers in the Chicago area discounts graduated by volume up to 4%. The Government selected thirteen store locations as the basis for its charge of price discrimination, four being A&P stores, one a Jewel store, and the eight others independents. A&P and Jewel by individual arrangements were receiving special discounts totaling 8½%; the three largest independents were receiving special discounts of 5½%; one was receiving the 4% scheduled discount, and the remaining four were receiving the scheduled 3% discount.

In order to justify these discounts, Borden had a comprehensive cost study made covering not only the stores selected by the Government, but all grocers served on Borden's 134 wholesale routes in the Chicago area. This study sought to ascertain to the greatest extent possible all the

direct and indirect costs of sale and delivery which could be assigned or allocated on a customer-by-customer basis.

From the data placed in the record through the cost study, Borden made numerous arithmetical computations, and presented the results in four alternative forms in its Summary Schedules I, II, III, and IV, each employing a different but recognized method of assigning costs. Each of the four schedules separately showed that the discounts to A&P and Jewel were more than cost-justified as against discounts to each class of independents. Schedule I, for example, shows that the discounts were more than cost-justified on the basis of direct costs alone, thus eliminating all argument over the choice of method of allocating indirect costs.

The Government does not now criticize the methods employed in making the cost study, nor does it point to any error in any of the computations in the Summary Schedules. The District Court found that the cost study was made in good faith and that the cost study justified the discounts under attack.

The Government's attack against the findings and judgment in the District Court is limited to a charge that the special discounts individually given to A&P and Jewel constitute a "classification" of customers which was improper under the cost-justification proviso of the Act.

I.

The first ground of attack—that the "classification" was arbitrary since it grouped "chain stores" together simply because they were "chain stores" or because of the "form of ownership"—is both unsupported by any evidence and is contrary to the undisputed facts. The record is devoid of evidence that Borden favored "chain stores as such";

the special discounts to A&P and Jewel were granted individually and not as a result of any policy of classification; and the very term "chain stores" crept into the case solely because of its use by the lawyers as a descriptive convenience. The record affirmatively showed that other considerations than "form of ownership" brought about the granting of these special discounts. A&P and Jewel together purchased twice as much as all "independents" combined; their total purchases were more than 190 times the purchases made by the largest independent.

II.

The second ground of attack—that no classification of customers is proper unless it is shown that every *individual* member of the class deserves no better treatment on the basis of *his* costs of sale and delivery—would completely frustrate the Congressional purpose in enacting the cost-justification proviso. The purpose of Congress was to leave sellers free to pass on to their customers, and eventually to the ultimate consumer, all the economies which the ingenuity of individual purchaser-customers could produce by their methods or quantities of buying and receiving goods. When a seller such as Borden is dealing with hundreds of purchasers, the only practicable way of passing on such economies is through the classification of customers having generally the same characteristics. The necessity for such classification has been recognized by the Federal Trade Commission, by the Courts of Appeal, and by the experts in the field of accounting called as witnesses by the Government.

III.

But in any event, the Government's contention has no relevance to the present case, since the Borden cost-justification study analyzes costs on a customer-by-customer basis

and thus provides the means of verifying the reasonableness and fairness of Borden's "classification."

The facts in the present record show that centralized buying by A&P and Jewel resulted in economies in solicitation costs in excess of 2% of sales as against any independent store. The facts also show that the economies realizable in centralized bookkeeping account for a further substantial differential in costs. These two economies alone total 2.68% of sales, which is nearly enough in itself to justify the 3% differential between the discounts given A&P and Jewel and the discounts given the three largest independents listed by the Government in its prima facie case.

In addition, the record shows that there were numerous general distinctions between A&P and Jewel stores and the 80 largest independents which produced substantial further economies. For example, three items of delivery expense alone were enough to show an additional 2.2% differential between the costs of delivery to A&P and Jewel stores and to the 80 largest independents.

These facts fully support the finding of the District Court that Borden's "classification" of customers was reasonable and proper.

IV.

The Government, without troubling to ascertain the facts, argues that, since one independent (Schubert) had a volume somewhat in excess of the *average* volume delivered to individual A&P and Jewel stores, there must have been many others in the same situation. The Government also asserts that the sales to independents, who purchased amounts equivalent to the *average* deliveries to A&P and Jewel, necessarily produced economies which entitled the independents to the same or approximately the same discounts.

Only two independents purchased in quantities in excess of the *average* deliveries to A&P and Jewel stores. Of these, Schubert was by far the largest, his volume being 25% in excess of the next largest independent.

Nevertheless, the facts revealed by the cost study show that the direct expense of sale and delivery to Schubert accounted for approximately the full difference between the discount he received and the discounts granted A&P and Jewel, and that on any of several reasonable allocations of indirect expenses the discount differential was far more than fully cost-justified.

Since these figures reflect the entire economies produced by Schubert's volume, this analysis shows *a fortiori* that the discounts to other independents, all of which purchased substantially lesser quantities than Schubert, were more than fully cost-justified on a customer-by-customer basis.

For all these reasons, the Government has failed to advance a single reason why the findings in the District Court and the judgment entered on those findings should be set aside.

ARGUMENT

I. CONTRARY TO THE BASIC ASSUMPTION OF THE GOVERNMENT, THE RECORD IS DEVOID OF EVIDENCE THAT BORDEN DISCRIMINATED AMONG ITS CUSTOMERS "ON THE BASIS OF FORM OF OWNERSHIP" AND FAVORED "CHAIN STORES AS SUCH."

The Government's statement of the "Question Presented" starts with these words:

> "Whether a seller who discriminates in price in favor of chain stores, as such, can cost-justify the discrimination . . ." (Br. 3).

The assumption that Borden discriminates in favor of "chain stores" *qua* chain stores is a recurrent theme throughout the Government's Brief. Borden is accused of having classified its customers "on the basis of form of ownership" (Br. 25), of making "a distinction between chain stores and independent stores, as such" (Br. 37-8), and of granting discounts "dependent upon form of ownership" (Br. 49).

Borden is also accused of having a "pricing system" or "discount policy" which was based "upon an initial classification of all its grocery store customers as either 'chain' or 'independent'" (Br. 8, 50). The final plea of the Government is for an injunction prohibiting Borden "from adopting any price or discount policies based upon a classification of its customers into chains and independents" (Br. 51).

It is noteworthy that in no instance does the Government cite the record to support these assertions. The record not only fails to support this basic assumption of the Government, but shows, to the contrary, that Borden's special discounts were based on the volume of purchases.

A. The record completely fails to support the Government's basic contention that Borden had a "policy" of classifying its customers as "chains" or "independents," and of favoring the former because of the "form of ownership."

Borden *never* adopted, published, or used a discount schedule, policy or plan in which customers were classified as "chain stores" or "independent stores." No document, statement, or utterance of any Borden official using the phrase "chain stores" appears in the record. Borden *never* adopted "discount policies based upon a classification of its customers into chains and independents." The record is devoid of any evidence whatsoever from which the existence of such a "policy" may be inferred.

The stipulated facts show that the only discount schedule ever formulated or published by Borden applied by its terms to all grocer customers based on volume of purchases (R. 82). The stipulated facts show that all the deviations from this schedule which appear in the record were made on an individual customer-by-customer basis—to A&P and Jewel by separate and independent letters (R. 83-4), and to Popik, Schubert, and Cartan by individual arrangements which were not spelled out in the evidence (R. 76).

A&P and Jewel are never once described as "chain stores" in the pre-trial order which sets forth the Government's prima facie case (R. 75-86). Furthermore, this order says nothing about any "discount policy" based upon the "form of ownership," and distinguishing between "chain stores" and "independents" as such.

The record shows that the term "chain stores" crept into the case through its use by the lawyers simply as a matter of descriptive convenience. The pre-trial order embodying the Borden cost study stated that "for purposes of the cost

study," the customers served by Borden's wholesale routes would be "divided into three main classifications," the first being "stores owned and operated" by A&P and Jewel, the second being "all other store wholesale customers," and the third being "all other wholesale customers." For convenience, the order provided also that the A&P and Jewel stores "will hereafter be called 'chain stores'" and other store customers "will hereafter be called 'independent stores'" (R. 142).

The record is devoid of any evidence that Borden ever adopted a "policy" of "favoring" customers owning and operating more than one grocery store. A&P and Jewel happened to be the *only* customers then served by Borden in the Chicago area which owned or operated more than a single store (R. 142). There is not a scrap of evidence to show that, had other "chain stores" offered to purchase milk from Borden, they would have been granted the same discount.

The only conclusion permissible from the record is that Borden had no "policy" other than to consider the situation of its largest customers, both "chain" and "independent," and to grant special discounts on an individual basis where warranted.

B. The undisputed facts show that Borden granted special discounts primarily because of the volume of the individual customer's purchases.

The Government's prima facie case showed that Borden granted special discounts over and above its regular volume discount schedule to five of the ten customers listed by the Government: A&P, Jewel, Schubert, Popik, and Cartan (R. 79-80). The customer lists showed on their face that these were the five customers making the largest purchases.

This is affirmative evidence that Borden granted its special discounts to its largest purchasers because of the quantity of their purchases.

The record also shows that A&P and Jewel, the two customers receiving the largest discounts, were also by far and away Borden's two largest customers. Thus, in the week covered by the cost study, A&P and Jewel together bought \$195,262 of milk from Borden, while the combined purchases of all the 1,322 "independent" grocer customers amounted only to \$98,672 (R. 217). This is affirmative evidence that A&P and Jewel were granted their special discounts primarily due to the total volume of their purchases.

The fact that Schubert, Popik, and Cartan received special discounts despite the fact that they were "independents" disproves any inference that Borden gave special discounts only to "chain stores."

The repeated charges made by the Government that the chain stores received a fixed discount "regardless of quantities or varieties purchased" (Br. 8), "regardless of quantities or points purchased" (Br. 9), "irrespective of volume" (Br. 10), and "not dependent upon their volumes of purchases" (Br. 21) are thus contradicted by the record.

II. THE GOVERNMENT'S CONCLUSION THAT CLASSIFICATION OF CUSTOMERS FOR COST JUSTIFICATION PURPOSES SHOULD NOT BE PERMITTED UNLESS VERIFIED ON A CUSTOMER-BY-CUSTOMER BASIS WOULD NULLIFY THE COST-JUSTIFICATION PROVISO AND FRUSTRATE THE INTENT OF CONGRESS.

The Government's Brief states that "the substance of the Government's argument" is that Borden violated the Act by "its use of a broad classification of chains and independent stores" (Br. 50), which is attacked on the ground that

every "*individual* purchaser is entitled to the same treatment by his seller as his competitor unless it can be shown that the volume of *his* purchases or *his* method of purchasing and accepting delivery" justifies a higher charge (Br. 36-7, emphasis added). In other words, the Government insists that cost justification must be made on a customer-by-customer basis.

The Government's arguments are wholly theoretical, unsupported by any precedent whatsoever, and based on assumptions which the record facts refute. We propose to show under this proposition that the Government's contentions, if adopted, would nullify the effectiveness of the cost-justification proviso of the Act, and frustrate the intent of Congress. Under the succeeding proposition, we shall show that, irrespective of the Government's theoretical arguments, the specific facts in the record completely establish the reasonableness of the customer classification which Borden made.

A. The cost-justification proviso of the Robinson-Patman Act should be liberally interpreted to accomplish the legislative intent that business be free to pass on to consumers the benefits of all economies resulting from efficient methods of production and distribution.

Congress adopted the cost-justification proviso because it desired to leave "trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution" (H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 9 (1936)). Congress believed that this proviso would benefit the consuming public because it would permit "the translation of appropriate shares of any savings so effected up and down the stream of distribution

to the original producer and to the ultimate consumer" (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5 (1936)). Congress repeatedly emphasized that it wanted to preserve to the fullest justified extent "the seller's freedom to give a part or all of the saving so effected to others with whom he deals . . . in lower prices to the customer, including the ultimate consumer who buys them" (H. R. Rep. No. 2287, p. 17).

Congress had no animus against "chain stores" or other mass distributors, and recognized that their methods of centralized buying might well produce economies of the kind contemplated by the proviso. The House Report expressly points out that the benefits to be passed on included all

> "that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail order house, department store, or from the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes" (H. R. Rep. No. 2287. p. 17).

Congressman Utterback, floor manager for the bill, explained the cost-justification proviso by saying:

> "It is through this clause that the bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution. . . ." (80 Cong. Rec. 9417, June 15, 1936).

Congress clearly intended that the efficiencies and economies resulting from the methods employed by mass distributors such as "chain stores" could be freely passed on to such purchasers.

Nor was Congress concerned with limiting the kind or character of the economies which could be reflected in price differences. As Congressman Utterback put it:

> "There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which these economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible" (80 Cong. Rec. 9417, June 15, 1936).

The sole problem is whether the price differential does no more than make "due allowance" for the economy achieved. Congress recognized that this phrase was no more than a generalization; both the Senate and House Reports noted that this phrase "does not require the differential, if granted, to be the arithmetical equivalent of the difference" in costs (S. Rep. No. 1502, p. 5; H. R. Rep. No. 2287, p. 10).

"Due allowance" requires an analysis of costs which, if carefully done, necessarily involves the use of accounting techniques. Here arises the need and place of the cost-justification study (R. 643-4).

Speaking of the phrase "due allowance" used in the proviso, the Cost Justification Report comments:

> "Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.
>
> "In view of the plus-or-minus leeway which must be granted to all cost figures . . . 'due allowance' should not be construed in every case to require full and complete cost justification of a price differential" (R. 773).

Commenting that the proviso "operates in a complex area" and many problems arising under it "are not given to ready solution," the Report further comments:

> "Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role" (R. 792).

The cost-justification proviso recognizes the economic fact that it costs more for a seller to deal with some customers than with others. It asserts the right of the manufacturer or seller to pass on to its customers, and hence on to the general public, the benefits of the lower costs which some customers make it possible for such manufacturer or seller to attain. Hence, the Act should be so interpreted and applied that it does not impede any "price variation reasonably related to economies in *any* of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions" (*ibid.*).

B. A broad classification of customers for cost-justification purposes is often necessary to effectuate the purposes of the proviso, and has consistently been upheld by the Federal Trade Commission and the Courts.

If the cost-justification proviso is to serve its legislative purpose, classification of customers, and cost-justification on the basis of such classification, is an absolute necessity in the case of a business enterprise, such as Borden, dealing with a multiplicity of customers. The necessity for such classification was succinctly summarized in the Cost Justification Report:

> "Classification or grouping of customers, orders, commodities and transactions has repeatedly been recog-

nized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sales transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers" (R. 776-7).

Two of the experts relied on by the Government in this case, Sawyer and Taylor, reaffirmed their agreement with this passage of the Report (R. 832, 943), while Professor Taggart tated: "I think I probably wrote that" (R. 671).

The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) states flatly that

> "In our view, furthermore, any compulsory allocation of joint distribution costs among *individual* transactions or *individual* customers, or *individual* items in a seller's homogeneous product line, casts an unwarranted burden on businessmen" (Report at 175).

As the Cost Justification Report states, the Federal Trade Commission has repeatedly sustained cost justifications based on classification of customers and analysis of costs to each class (R. 776).

In *Bird & Son, Inc.*, 25 F.T.C. 548 (one of the first two complaints issued after the passage of the Act), the Commission sustained a cost defense based on the aggregate costs to all mail order customers, of whom Montgomery Ward was by far the largest. The defense was upheld despite the aggregating of costs to *all* mail order customers.

In *United States Rubber Company*, 46 F.T.C. 998, the Commission approved a classification of customers based upon volume of purchases, upholding cost justification with respect to 53 out of 57 classifications. Classification by discount brackets was also approved in *B. F. Goodrich Company*, 50 F.T.C. 622.

In *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, the Commission held that a discount schedule providing different discounts to seven classifications of customers grouped by volume of purchases could be cost justified on the basis of costs applicable to the different classes, and overruled an attack based on the fact that "respondent did not know the cost of selling and distributing to any particular customer within any one of the price brackets" (See brief of counsel quoted by Taggart, "Cost Justification," Michigan Business Studies, Vol. XIV, No. 3, 1959, at p. 282).

The propriety of classifying customers for discount and cost-justification purposes has also received judicial approval.

In *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951), the District Court had rejected a cost defense based on costs of selling groups of customers, asserting that the only way "actual costs" could be determined was on the basis of the "sales cost to individual customers and to individual plants of customers who operate more than one" (87 F. Supp. 484, 495, W.D. Ark. 1949). The Court of Appeals reversed, holding that the District Court had "applied too rigid a standard." The Appeals Court pointed out that if records had to be maintained sufficient to "record the expenses incurred in selling every individual customer, and all the data which the plaintiff deems essential, the burden, expense and assumption of

risk would seem to preclude the granting of quarterly discounts" (191 F. 2d at 59).

Reid v. *Harper & Brothers*, 235 F. 2d 420 (2nd Cir. 1956), took essentially the same position, rejecting the contentions that total costs to a group of customers could not be aggregated, and that cost differentials to each customer on each transaction had to be supplied. To the contrary, the Court held:

> "To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyer, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such a requirement might be to discourage *all* price differentials, even those actually justified by cost distinctions" (235 F. 2d at 422).

In dealing with more than 1,300 individual customers, as in the present case, cost justification must necessarily be based in large measure upon aggregation of costs by groups if the legislative purpose behind the cost-justification proviso is not to be completely frustrated.

C. The arguments of the Government in the present case would, if adopted, amount to legislative repeal of the cost-justification proviso.

In the District Court, the main thrust of the Government's attack upon Borden's cost study was that "cost differences between store customers can only be determined by comparing the costs of delivering various quantities of milk to individual stores" (Gov. Reply Br. 67; repeated 70-71).

The Government's Brief in this Court professes to abandon this contention, conceding,

> "As a matter of practical necessity, however, when a seller deals with a very large number of customers, he

cannot be required to establish different cost-reflecting prices for each customer. The seller must be permitted to establish appropriately defined classes of customers and to promulgate prices for each class which reflect the cost savings necessarily involved in dealing with that class" (Br. 28).

Having thus given lip-service to a principle that courts, Commission, and commentators have all approved, the Government then proceeds to hedge on this concession by imposing conditions which in substance require customer-by-customer cost-justification.

The Government's first step in undercutting the conceded right to classify customers is to assert that the classification must not "result in substantial and unjustifiable discriminations against *individual* members of the disfavored classes" (Br. 29, emphasis added). After several pages of wholly theoretical assertions for which there is sanction neither in precedent or logic (Br. 29-36), the Government's Brief comes full circle with the following conclusion:

> "In short, it is the government's contention that only classifications of customers in terms of those differences in quantity or method of dealing which substantially account for the lower price to the *individual* members of a particular class can ever be the basis for a pricing policy or a cost justification" (Br. 37, emphasis added).

The Government contends

> "that an *individual purchaser* is entitled to the same treatment by a seller as his competitor unless it can be shown that the volume of *his* purchases or *his* methods of purchasing and accepting delivery from the seller differ from his competitor's to a degree warranting a given price differential" (Br. 36-7, emphasis added).

But this showing can only be made by a study of the actual costs of serving such individual customer. Nevertheless, the Government goes on to contend that if Borden wanted to recognize cost savings in dealing with different customers,

> "it had to do this with a price schedule which applied equally to every customer, regardless of form of ownership, and which determined *each individual customer's discount* in terms of the efficiencies and economies which give rise to Borden's cost savings" (Br. 49, emphasis added).

In other words, the Government argues that customers may be classified only when the costs to *each individual customer* are ascertained and found to be the same or similar to the other individual members of the class.

As a practical matter, this means customer-by-customer cost-justification, which is obviously wholly impracticable. Thus, the Government, giving lip service to the practical necessity of classification for cost-justification purposes, actually insists upon customer-by-customer cost-justification. This robs "classification" of any meaning and prevents it from accomplishing the very purpose which business realities make it necessary that it accomplish.

By these arguments, the Government is asking this Court to rule, as a matter of law, that cost-justification must be on the basis of an analysis of costs customer-by-customer, and that cost-justification by a study of aggregate costs to groups of customers is forbidden. Nothing in the language of the cost proviso compels this result; the Commission, the Courts, and the Government's own expert witnesses reject such a result as wholly impracticable; and the effect would be frustration of the legislative intent by making the cost-justification proviso useless.

III. BORDEN'S GRANT OF LARGER SPECIAL DISCOUNTS TO A&P AND JEWEL THAN TO INDEPENDENT STORES WAS, TO THE EXTENT THAT IT CONSTITUTED A CLASSIFICATION OF CUSTOMERS, REASONABLE IN THE LIGHT OF THE FACTS.

The finding of the District Court upholding Borden's "classification" of A&P and Jewel as the recipients of the largest special discounts, was supported by a multiplicity of evidentiary facts.

A. The vast differences between the total purchases of A&P and Jewel and those of the largest independent were sufficient in themselves to make the classification reasonable.

As has been previously pointed out, Borden's sales to A&P and Jewel were double the total sales to all independents combined, and were many times larger than Borden's sales to Schubert, who was in turn the largest "independent" customer. The weekly deliveries to the 254 A&P and Jewel stores averaged $768.74 per store, while those to the 80 largest "independents" averaged only $289.59 per store (R. 180-1, 217).

The "differing amounts" in which sales and deliveries were made to the two "classes" of customers was thus so extreme as to constitute, without more, a "showing" justifying the separate classification of these two customers in order to ascertain whether the discounts granted made only "due allowance" for differences in the cost of sale or delivery resulting in the quantities purchased.

The Government attacks this classification on the ground that the largest independent (Schubert) actually purchased more points per day than the *average* amount delivered to

chain store locations (Br. 39-40, 46), and on the additional ground that "there are almost certainly other large independents" in a similar position (Br. 46-7).

Had the Government checked Bulk Exhibits 4, 6, or 7, it would have discovered that Schubert was by far and away Borden's largest "independent" store customer. The Government would have discovered that Schubert's purchases for the week totaled 4801 points, and that the purchases of Schubert and the next five largest independents* compared as follows:

1. Schubert	4801	points
2.	3607	points
3.	3429	points
4.	3324	points
5.	3293	points
6.	2502	points

The Government would also have discovered from Bulk Exhibits 4, 6 and 7 that Borden served 112 A&P stores, delivering a total of 379,511 points for an average of 3389 points per store, and that Borden served 142 Jewel stores, delivering 534,025 points for an average of 3761 points per store. The average points delivered to A&P and Jewel stores combined was 3596.

These facts show that Schubert was the only independent purchasing more points than the average Jewel store, that only Schubert and one other independent out of 1322 stores purchased more points than the average "chain" store; and that only Schubert and two independents purchased more than the average A&P store.

* The five next largest independents after Schubert were not among those named in the Government's prima facie case.

These facts show that Borden's total sales to A&P and Jewel (913,536 points, R. 217) were 190 times the sales to the largest independent, Schubert; that Borden's sales to Jewel were 110 times the sales to Schubert; and that Borden's sales to A&P were more than 75 times Borden's sales to Schubert.

In other words, of the 80 largest independent stores, only three had purchases equal to the *average* purchases of A&P stores; and not a single independent had purchases equal to one-seventy-fifth of the total purchases by A&P.

These facts are sufficient in themselves to show that A&P and Jewel formed a homogeneous class of customer in that their purchases from Borden were of a magnitude roughly comparable to each other but of an entirely different order than the purchases by any of the independents.*

B. The Government's contention that classification by amount of total purchases rather than by amounts delivered to individual stores was unreasonable ignores the facts showing economies inherent in mass buying.

Stripped to its essentials, the sole ground on which the Government attacks Borden's classification of customers is based on the assumption, contrary to fact, that total volume of purchases, as distinct from volume of deliveries to a specific location, can never produce economies.

This wholly gratuitous assumption that total purchases has no meaning cost-wise when delivered to more than one location, and that volume produces economies only with respect to deliveries to single locations, is repeated throughout the Government's Brief (Br. 21, 23, 39, fn. 10, 46).

* This answers the Government's claim (Br. 47-8) that there was no showing that A&P and Jewel were sufficiently similar to be properly accorded the same discount.

This, for example, is the assumption that lies behind the argument that, since Schubert's purchases were "well above the chain average," this fact "meant that to the extent the discounts were based upon quantity savings Schubert should have received a substantially greater discount than either chain customer" (Br. 39).

The falsity of this assumption is easily demonstrated by facts in the record in the present case.

1. *Economies in solicitation of A&P and Jewel business*

Mass buying by a chain store at a single point obviously reduces the cost of selling the customer. Only one man needs to be called on instead of several hundred. In the case of A&P and Jewel, Borden was represented in 1955 by three of its officials. The stipulated facts show that the total weekly expense for these men and their staff applicable to the wholesale routes surveyed was only $358.69 (R. 517-8: 50.39% of $37,015.26 divided by 52). The stipulated facts also show that the time spent by these men on chain store matters was *less* than the time spent on independent store problems (R. 144). Since sales to A&P and Jewel were twice those to all independents, an allocation of executive time would tend to increase the margin of cost justification in favor of the chain stores.*

Sales to independents were solicited and serviced by "salesmen and solicitors," who do *not* solicit the business of chain stores (R. 134). The weekly average cost of the salaries of these men was $2,065.83 (R. 137). Dividing this weekly cost by total sales of $98,672.52 to independents (R.

* If we assume, contrary to the stipulated facts, that all executive time should be charged against A&P and Jewel, this would result in a sales solicitation and service cost of about $0.18 per $100 of sales ($358.69 divided by weekly sales to A&P and Jewel of $195,262; see R. 217).

217), produces a sales cost of slightly more than \$2.09 per \$100 of sales.

These figures demonstrate that the cost of solicitation of independent business was at least \$2.09 per \$100 of sales greater than the cost of soliciting chain store business. Thus, the total volume of chain store purchases resulted in a saving of 2.09% and in itself justified a discount to A&P and Jewel of 2.09% greater than that which *could* have been earned by *any* independent.

The Government tries to escape from these facts by asserting that, as to solicitation methods, "There is no showing of any necessity for this internal division of labor," and that "large independents could be serviced in precisely the same way as the chain stores" (Br. 43). A moment's reflection will demonstrate the palpable absurdity of these contentions. Does the Government suggest that it would be feasible for Borden's District Chairman to call on 80 independent store customers to secure a volume less than half that secured by calls on two customers, A&P and Jewel? Or does the Government suggest that the solicitors and salesmen call on the managers of the individual chain store units who have no authority to make purchases?

The other argument of the Government is that this expense differential "would account for only about two-fifths of the calculated difference between serving Borden's chain customers, as a class, and the 80 largest independents, as a class" and hence "could not properly be used as a basis for a classification" (Br. 43-4). The obvious answer is that this item alone accounts for approximately 2% out of the 3% discount difference between Schubert, the largest independent, and A&P and Jewel. It is therefor a substantial distinction, which clearly warrants the grouping of one type of customer apart from the other.

2. *Economies in centralized bookkeeping*

Another major economy resulting from mass-buying by A&P and Jewel arises from the fact that these companies paid for their purchases weekly on a centralized billing basis (R. 174, items 14 and 15). The dollar amount of purchases by item and in total did not have to be calculated by the drivers, but were checked and calculated by clerks in the branch offices, who naturally had the assistance of calculating machines (R. 202). However, the signature of the store manager had to be secured (R. 174-5, item 17). From the tickets extended and totaled at the branch office, clerks in the division main office prepared a single total invoice for each chain store customer each week (R. 205, 209).

This procedure was obviously impractical in the case of independents. The large majority, including Schubert, paid cash for each delivery, which payments necessarily had to be handled by the driver. This means that the driver had to extend and total the sales tickets (R. 174, items 14 and 15). Some independents had asked to be and are placed on a credit basis. Since centralized billing to such individual customers would have produced no economies, the collection of such accounts had to be handled by the drivers (R. 174, item 16). This means that the drivers had to extend and total the daily sales tickets, secure the customer's signature daily, and collect periodically when making a delivery (R. 174-5, item 16 and 17). Thus, there was little difference in the demands on the time of the driver whether the independent was a cash or credit customer.

The consequent differences in costs in collection were again appreciable, as the data in the cost study demonstrate. The various items of expense involved included central billing and credit expense and route activities identified in the pre-trial order as items 14, 15, 16, 17, 33, 38, 39,

and 40 (R. 174-7). Here is the comparison of these expenses between the two chain store customers and the 80 largest independents:

	A&P and Jewel	80 Largest Independents
Item 14	445.31	154.26
Item 15	0.00	106.07
Item 16	0.00	7.38
Item 17	406.98	15.05
Item 33	63.44	19.98
Item 38	163.49	0.00
Item 39	4.58	0.00
Item 40	0.00	.79
Billing Department	356.38	2.56
Credit Department	1.30	.57
	1441.48	306.66

(The first four items in the last column are from R. 187; the next four items are from R. 190; the first eight items in the middle column are from R. 183; and the last two lines from R. 585).

Now, these costs, divided by the total dollar sales to chain stores of $195,262.07 and to the 80 largest independent stores of $23,167.35 (R. 217) amount to $1.32 for every $100 of sales to the 80 largest independents, and only $0.73 per $100 of sales to the chain store customers. These items alone justify an additional discount advantage to the chain stores of more than .59%.

The Government attacks the validity of using for cost justification purposes the economies resulting from central billing as against collection by drivers on the ground that "no evidence was adduced to show: (i) that the latter method of collecting on credit accounts was inherently more

costly; (ii) if so, why the cheaper method was not also used with the independents; and (iii) what the extent of the difference was" (Br. 42). The record facts summarized above are a complete answer to objections (i) and (iii). As to why the cheaper method was not used with the independents, the obvious answer was that centralized billing was only cheaper because the sales to many stores could be handled collectively.

No successful business such as Borden is going to burden itself with a more costly method of doing business with some customers than is necessary simply to justify a greater discount to other customers.

3. *Other economies of mass buying*

The matters listed above do not exhaust the economies inherent in mass buying, such as the ability to calculate and prepare only two discount checks to chain stores as against 930 checks to independents (R. 181, 205, 210-1). All these are the type of economies realizable from the "mass buying" which the House Report on the bill which became the Robinson-Patman Act specifically listed as a source of economies which may properly be reflected in discounts (H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 17 (1936)).

The two specific economies resulting from centralized buying by A&P and Jewel themselves which are discussed above together justify the giving of these chain stores a 2.68% greater discount than that given the 80 largest independents. The difference between the discounts given these two chain customers and Schubert, the customer on which the Government relies, was only 3%.

When the Government asserts that there were no cost savings "involved" in selling A&P and Jewel "which could not have been realized in selling the largest customers clas-

sified as independents" (Br. 21), the Government was making an assertion which is plainly contrary to fact. The Government's bland assumption that the economies to be derived from the quantities in which goods are sold and delivered are limited to those obtained by delivering more to some single locations than to other single locations is completely erroneous.

C. The record shows many other facts supporting the reasonableness of Borden's classification of customers.

Since it is wholly impracticable to insist that a class be defined in terms of specific cost savings attained by each member, the reasonableness of a classification must obviously depend upon distinctive characteristics *generally* applicable to the class.

The record shows beyond question that there were numerous general distinctions between the A&P and Jewel stores on the one hand and the independents on the other:

First: It required a grand total of 11,538 minutes of drivers' time at a cost of $895.28 in the case of A&P and Jewel stores, to carry milk from the trucks to the designated point of delivery on the store premises, while it required 12,709 minutes, at a cost of $986.15, in the case of all independents, and 2,041 minutes, at a cost of $158.38, in the case of the 80 largest independents (R. 173, item 8, R. 183, 187). This shows that it took *less* time to carry milk into the chain stores than into the independents, although sales to the latter were only one-half the sales to the former. Furthermore, although sales to A&P and Jewel were 8.4 times as much as to the 80 largest independents, the time spent on this activity at the A&P and Jewel stores was only 5.6 times that spent at those 80 independent stores.

Second: Another difference is dramatically illustrated by the relative time spent on the driver activity of stocking

and packing merchandise in the store refrigerator (R. 173, item 11). While only 3,367 minutes, at a cost of $261.26, were spent in the aggregate on this activity in the A&P and Jewel stores, a total of 20,959 minutes, at a cost of $1,626.30, was spent performing this function with respect to half the same volume in the independent stores (R. 183). Here the 80 largest independents were remarkedly different from the A&P and Jewel stores, since this activity took 4,866 minutes in these stores, at a cost of $377.57 (R. 187).

Third: The quantities estimated as the day's requirements of the store were more easily assembled from the trucks in the case of A&P and Jewel than in the case of the independents. This activity (R. 172-3, item 7) required an aggregate of 17,856 minutes, at a cost of $1,385.53, in the case of A&P and Jewel, as contrasted with 23,600 minutes, at a cost of $1,831.23 in the case of all independents, and 3,635 minutes, at a cost of $282.06, in the case of the eighty largest independents (R. 183, 187). Although the sales to A&P and Jewel were 8.4 times as much as the total sales to the 80 largest independents, the time spent on this activity was only 4.9 times the time spent at those 80 largest independents.

Thus, three general characteristics of independent stores produced a substantial differential in costs of delivery.

	A&P and Jewel	80 Largest Independents
Item 8	$ 895.28	$158.38
Item 11	261.26	377.57
Item 7	1,385.53	282.06
	$2,542.07	$818.01

Thus, the cost of the three activities in connection with the 80 largest independents was $0.03535 per dollar of sales

($818.01 divided by $23,167), while the cost with respect to A&P and Jewel was only $0.01302 per dollar of sales ($2,542.07 divided by $195,262). A&P and Jewel were thus entitled to 2.2% greater discount than the 80 largest independents with respect to these three items alone.

There were other important distinctions. In the six years up to and including the cost study, all bad debt losses from store customers had been incurred by extension of credit to independents, and none by any chain store (R. 215). A greater proportion of the time spent by Borden executives and administrative employees on particular customer activities "is spent on problems of independent stores than the sales of such stores bear to the sales of chain stores" (R. 144-5). The stores operated by A&P and Jewel tended more than independent stores to be concentrated in areas with denser population, reducing truck time between store locations (R. 138). Drivers were required to spend considerably more time with the independents in listening to complaints or discussions of store problems than with A&P and Jewel stores (R. 175, item 23). A total of 481 minutes was spent in this activity at the 254 A&P and Jewel stores, and 280 minutes at the 80 largest independents—an average of 3½ minutes per store in the case of the independents and less than 2 minutes per store in the case of A&P and Jewel.

Not all of these factors are capable of exact measurement; no effort was made, for example, to charge administrative costs on the basis of time spent on independent as compared with chain problems. But all of these factors emphasize a consistent difference between the costs of sale and delivery to A&P and Jewel and to the independents.

The only answer of the Government is that "Borden does not claim that all independent stores" require each of these

added expenses "but only that this extra delivery expense is more characteristic of the independent stores as a group than of the chain stores" (Br. 41). This is nothing more than a different way of saying that costs to each independent store must be ascertained before it can be granted a lesser discount than the chain stores. This argument would make all use of classification useless, since discount differences would have to be justified on the impossible basis of a cost study, customer-by-customer.

The Government's attack on the Borden cost study boils down to this: unless costs are studied customer-by-customer, it is possible that some large independent *may* have been hurt. The Government, despite the fact that it had the data to prove such injury to individuals if any existed, asks this Court to *speculate* that some individual customer deserved better treatment.

This is the kind of attack on a cost study which the Federal Trade Commission will not accept:

> "It has been urged that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket. This argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. But there has been no such showing in this case. Any annual quantity system of pricing is vulnerable to this argument and it may be controlling where it has practical aspects. Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification." *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 394.

D. The Government's wholly unproved assumption that "cost saving factors" having a pre-determined value can be easily identified on a customer-by-customer basis is shown by the record to be false.

The Government spends six pages (Br. 30-6) in a theoretical discussion of hypothetical situations with respect to imaginary customers A through I. This discussion starts with the assumption that in a seller's dealings with his customers there are always identifiable "cost saving factors" which are present or absent (Br. 31, 34) and which, if present, invariably produce a saving within a fixed range (e.g., "7¢ to 9¢" and "2¢ to 4¢": Br. 34). Upon this unproved assumption a second unproved assumption is piled: that a store can elect whether to conduct its affairs so that factor #1 or factor #2 can be present or absent. Still a third assumption is made, and that is that a seller can compute a discount and classify his customers on the basis of such a pre-election by the customer to have a specific cost factor present or absent.

Every one of these assumptions is not only unproved, but is disproved by the record. The Borden cost study shows that there are more than 40 different activities which may affect differential costs. These "factors" in most instances are present in all cases. It takes time to carry goods into a store; it may take more time in one case than in another, due to factors entirely out of the control of the store operator, such as distance between the spot where the truck parks and the store entrance, and the physical layout of the store. The store operator cannot elect whether to take a particular service or not; the sole question is how much time the service will take. Neither a fixed range of savings nor the possibility of election exists.

Furthermore, to try to erect a pricing structure allowing

for the permutations of all possible combinations of 40 factors would be completely impracticable.

The whole argument is completely unrealistic. It involves a fourth and even more illogical assumption. It assumes, contrary to common sense, that Borden wilfully continues to provide specific costly "services" to specific independent customers when persuasion of its customers to abandon them would result in substantial economies to Borden.

The cold, hard reality is that the costs of delivery to independents are so much greater than to A&P and Jewel and that Borden makes a far greater profit *after discounts* on its sales to these two customers than it does on its sales to all classes of independents. On the basis of direct costs alone—the unchallengeable minimum—Summary Schedule I shows that it costs Borden $27.24 per $100 of sales to deliver milk to small grocers receiving no discount, $10.52 per $100 of sales to serve the 80 largest independents, and only $4.43 to serve A&P and Jewel (R. 585).

Borden has every interest to induce economies in delivery costs to its independent customers. Its inability to do so is established on this record. These were the business realities which the Government asks be ignored.

E. The Federal Trade Commission has not laid down any requirement as to classification of customers which is in any way inconsistent with Borden's cost study.

The Government asserts that

> "the Federal Trade Commission has, in a series of cases, established the requirement that the individual purchasers assigned to any one group for cost-justification purposes must be substantially related in terms of those factors which determine the cost of manufacture, delivery or sale" (Br. 29-30).

Whatever this supposed "requirement" means, it certainly is not spelled out in any of the four Commission decisions cited in support of the assertions.

In *Curtiss Candy Co.*, 44 F.T.C. 237, the Commission noted that respondent had attempted to cost justify by allocating selling costs on the basis of dollar sales without making any study which showed that this method of allocation was valid (44 F.T.C. at 267). Using this faulty method, the respondent sought to justify its prices on the 5% of its sales made to vending machine operators by comparing them with "all the rest of its various classes of customers," which included such diverse types as "chain grocery stores, syndicate stores, jobbers, and concessionaires." These various types of customers so grouped together "included those who received the benefits of the fall booking plan, discount deals, various discounts, free goods, and other price advantages," and the Commission pointed out that, as to them, "no attempt was made by the respondent to justify the special price discrimination or advantages" which various ones received. Since the charge covered all types of price discrimination, the Commission necessarily held that the attempted cost-justification had failed (44 F.T.C. at 267-8).

International Salt Co., 49 F.T.C. 138, is equally irrelevant. There, "a unit discount to purchasers classified as $50,000 purchasers" was sought to be justified without any attempt "to show any difference between the cost of handling a large order and that of handling a small order" (49 F.T.C. at 153). Instead, respondent arbitrarily took its total sales costs, divided by the number of individual sales transactions, and assumed that the resulting figure of $5.62 was the cost of filling a single order, "regardless of size and regardless of who the purchaser may be" (49 F.T.C. at 154). This was properly rejected because "the record does not

provide a basis supporting respondent's basic assumption" (*ibid.*).

In *Champion Spark Plug Co.*, 50 F.T.C. 30, respondent sold spark plugs to a number of oil companies operating service stations, including Atlas Supply Co. (acting for five Standard Oil Companies), Socony-Vacuum Oil Co., and Cities Service Co. The first two purchasers received a preference in price. Respondent sought to classify its customers for cost-justification purposes into two groups—the first consisting of Atlas and Socony and the second of City Service and respondent's 487 other distributors. No showing was made of *any* characteristic distinguishing Cities Service from the two favored oil companies. There was positive evidence that little sales effort was expended on Cities Service, but it was included in the group to which "respondent has allocated a major portion of its selling expenses." The cost defense was also defective in that there was insufficient basis in the record for some of the allocations used. The Commission concluded for all these reasons that "the evidence fails to establish" a justification for the price differentials (50 F.T.C. at 42-3).

Thompson Products, Inc., Trade Reg. Rep. (F.T.C. Complaints, Orders, Stipulations (1959-1960)) ¶ 27841, contains no criticism whatsoever of the classification of customers for purposes of cost justification. The major point of decision was that a lower price on auto parts sold to automobile manufacturers as a class created a competitive injury to the class of dealers purchasing directly who were in competition with the ultimate resellers of the parts. Inadequacies in cost justification as between the automobile companies amounting to 3%, 4%, and 7% were held to be more than *de minimis;* certain allocations in the cost justification study were held to be unsupported; and a cost justification based on an averaging of various prices paid

by various distributors for various parts was held to be, on the basis of the specific facts of that case, an improper method of cost justification.

By citing these four Commission cases as authority for an ambiguously worded "requirement" which none of them either expressed or applied, and by ignoring the cases we have cited in which the Commission has upheld customer classification, the Government is ignoring what the *expertise* and the experience of the Commission can teach us as to the practicabilities of cost justification.

There is no easy or practicable way to analyze costs on a customer-by-customer basis, as the record in this case fully demonstrates. The fact that in the present case Borden went to the expense of a cost study which analyzed costs of delivery on a store-by-store and customer-by-customer basis is no proof that discount schedules can as a practical matter be constructed on such a basis.

The Borden study in this case costs more than $50,000 (R. 220-1, 91). Such studies are valid only for a reasonable time before and after they are made. Neither Borden nor any other business enterprise could afford to make such studies, even in a greatly abbreviated form, each time a new discount schedule was called for by competitive and other circumstances.

Any business enterprise selling a multitude of customers must be permitted to make broad classifications of its customers on the basis of the general factors involved in selling and delivery to such customers. The requirement that such classifications be tested on the customer-by-customer basis which the Government demands would destroy the usefulness of the cost-justification proviso.

Summary as to Reasonableness of Borden's Classification of Customers

Borden's selection of A&P and Jewel as the recipients of larger discounts than any independent was a reasonable classification based upon numerous evidentiary facts.

In the first place, the total volume of purchases by these two customers was more than 190 times the volume purchased by the largest independent, and twice the total purchases by all independents combined. The economies resulting from mass-buying by these two customers in solicitation and bookkeeping costs were substantial and were almost sufficient in themselves to cost-justify the entire difference between the discounts to A&P and Jewel and those to the three largest independents named in the Government's prima facie case.

In the second place, the average volume of deliveries to each A&P and Jewel store was more than 2½ times the average volume delivered to the 80 largest independents. This average volume was greater than the volume purchased by all but *two* independents out of a total of 1322 independent stores. This volume of deliveries was a further source of economies.

In the third place, the time spent on deliveries to the A&P and Jewel stores was in many respects far less per dollar of products delivered than the time spent in deliveries to the independents, including deliveries to the 80 largest independents.

In the fourth place, Borden's dealings with A&P and Jewel entailed further demonstrable economies as against dealings with the independents. These economies were incapable of exact determination, but were pertinent to the reasonableness of the classification.

Finally, the direct costs incurred by Borden in making sales to A&P and Jewel were only $4.43 per $100 of sales, as compared with $10.52 per $100 of sales to the 80 largest independents and $14.07 per $100 of sales to all independents.

With these facts before it, the District Court was not only justified, but in fact compelled, to hold as it did hold that Borden's classification of customers was reasonable and proper.

IV. THE REASONABLENESS OF BORDEN'S CLASSIFICATION OF CUSTOMERS IS DEMONSTRATED BY THE FACT THAT THE COSTS OF SALE AND DELIVERY TO SCHUBERT, THE LARGEST INDEPENDENT, EXCEEDED THE COSTS OF SALE AND DELIVERY TO A&P AND JEWEL BY AN AMOUNT MUCH GREATER THAN THE DIFFERENCE IN DISCOUNTS.

The Government several times refers to the Schubert store as its example of the large volume independent who should have received as large or a larger discount as A&P and Jewel (Br. 39-40, fn. 12; 44, fn. 15; 46). The Government correctly asserts that this store had a volume $3\frac{1}{4}$ times the average of the 80 largest independents, and had daily purchases somewhat in excess of the *average* deliveries to A&P and Jewel alone (Br. 39).

Upon the sole foundation of these facts, the Government makes the following series of assertions: (1) "that to the extent the discounts were based upon quantity savings Schubert should have received a substantially greater discount than either chain customer" (Br. 39) or "at least the same $8\frac{1}{2}\%$ discount" (Br. 40, fn. 12); (2) that "Schubert's greater volume than the average chain store would result

in cost savings that would outweigh the cost differential resulting from the differential in solicitation costs" (Br. 44, fn. 15); (3) that, by Borden's classification, "a large independent such as Schubert was forced, regardless of its own operational techniques, to bear a substantial share of the extra costs Borden incurred in dealing with much smaller independents whose methods of dealing were more costly" (Br. 46).

The facts about Schubert were all in the Bulk Exhibits in the record below. Government counsel at the trial in the District Court presumably knew that every one of these assertions is contradicted by the record.

In order to put an end once for all to the myths about the economies resulting from the quantity of Schubert's purchase, we have included as an appendix to this Brief a reproduction of the forms prepared by the time study men showing the time of the route driver spent in providing service to Schubert. On the first page, lines 41, 42 and 43 combined cover the activity identified as item 6, referred to in the pre-trial order (R. 172). Similarly, lines 43 through 63 cover the activities identified as items 7 through 23 of the pre-trial order (lines 59, 60 and 61 combined constituting the activity identified as item 23). The forms thus reproduced constituted a part of Bulk Exhibit No. 4.

On the basis of this information contained in these forms, together with similar information as to special deliveries contained in Bulk Exhibit 8, the direct costs of serving Schubert can be computed. The results, compared with those set forth in Summary Schedule I for A&P and Jewel and for the 80 largest independents (R. 585), are set forth in the attached tabulation headed "Application of Summary Schedule I to Schubert." This tabulation copies columns 2 and 7 of the figures set forth in Summary Schedule I, and

Application of Summary Schedule No. I to Schubert. Cost Justification Based Solely on Direct Costs.

	Direct Costs	A&P and Jewel	Independent LS 4%	Henry Schubert
1.	Routemen's direct labor costs	$ 6,453.52	$ 1,648.21	$ 47.02
2.	Special delivery direct labor costs	36.66	9.10	2.45
3.	Branch office clerical salaries	649.79	107.11	1.34
4.	Billing department	356.38	2.56	—
5.	Credit department	1.30	.57	—
6.	Accounting department	8.25	.82	.01
7.	Robert F. White & Company	—	8.52	.11
8.	Tabulating department	12.12	3.88	.05
9.	Bad debt losses	—	1.90	—
10.	Loss on returned products ...	1,139.20	167.72	2.32
11.	Salesmen's and solicitors' salaries	—	486.92	21.38
12.	Total direct costs	$ 8,657.22	$ 2,437.31	$ 74.68
13.	Sales Volume	$195,262.07	$23,167.35	$1,017.13
14.	Cost Per $100 of Sales	$ 4.43	$ 10.52	$ 7.34

adds a third column setting forth the direct costs of selling Schubert.

This tabulation shows that the *direct* costs of sale and delivery to A&P and Jewel totaled $4.43 per $100 of sales; that the *direct* costs of sale and delivery to the 80 largest independents (the 4% "class") was $10.52 per $100 of sales; and that the *direct* costs of sale and delivery to Schubert was $7.34 per $100 of sales.

This tabulation shows that, *on the basis of direct costs alone*, a discount differential of 2.91% between Schubert and A&P and Jewel was cost-justified. The difference between this figure and 3% was thus only nine one-hundredths of one per cent. This amount was only one-tenth of the unjustified amount held by the Federal Trade Commission to be within the rule of *de minimis. United States Rubber Co.*, 46 F.T.C. 998, 1012.

But *direct* costs necessarily reflect only part of the actual cost differentials. Tabulations based on three alternative but well-recognized methods of allocation of *some* of the indirect costs are therefore submitted with this section of the Brief.

The first of these alternative tabulations is that headed "Application of Summary Schedule II to Schubert." Here the first two columns are identical with columns 2 and 7 in Summary Schedule II, while the third column is a computation of Schubert's costs based on the same method of allocating indirect and overhead costs (R. 597).

Summary Schedule No. II is based on the use of the common and approved method of permitting those indirect and overhead costs which are related to the assignable direct costs to be allocated in the same proportion as the direct costs are chargeable or assigned. This accounting method was approved as reasonable by the Government's

Application of Summary Schedule No. II to Schubert. Cost Justification Based on Allocation of Major Indirect and Overhead Costs on Basis of Direct Cost.

		A&P and Jewel	Independent LS 4%	Henry Schubert
	Direct Costs			
1.	Routemen's direct labor	$ 6,453.52	$1,648.21	$ 47.02
2.	Special delivery direct labor	36.66	9.10	2.45
3.	Branch office clerical	649.79	107.11	1.34
4.	Billing department	356.38	2.56	—
5.	Credit department	1.30	.57	—
6.	Accounting department	8.25	.82	.01
7.	Robert F. White & Company	—	8.52	.11
8.	Tabulating department	12.12	3.88	.05
9.	Bad debt losses	—	1.90	—
10.	Loss on returned products	1,139.20	167.72	2.32
11.	Salesmen and solicitors	—	486.92	21.38
12.	Total direct costs	$ 8,657.22	$2,437.31	$ 74.68
	Indirect Costs			
13.	Routemen's indirect labor	4,293.70	1,209.02	37.04
14.	Special delivery indirect labor ..	95.80	26.97	.83
15.	Wholesale truck costs	2,647.63	745.51	22.84
16.	Total indirect delivery costs	$ 7,037.13	$1,981.50	$ 60.71
17.	Total direct and indirect sales and delivery costs ...	15,694.35	4,418.81	135.39
	Overhead Expense			
18.	Advertising allowance	1,303.74	158.26	6.83
19.	Branch overhead expense	7,317.66	2,060.49	63.13
20.	Soda straws, etc.	—	—	—
21.	General and administrative expenses	1,525.91	429.66	13.16
22.	Total overhead expense	$10,147.31	$2,648.41	$ 83.12
23.	*Grand Total Costs*	$25,841.66	$7,067.22	$218.51
24.	Costs Per $100.00 of Sales ..	$ 13.23	$ 30.51	$ 21.48

experts (R. 662, 667-9, 1037) and justified by Malone (R. 135, 177).

This tabulation shows that costs incurred by A&P and Jewel were $13.23 per $100 of sales, by the 80 largest independents $30.51 per $100 of sales, and by Schubert $21.48 per $100 of sales. By this analysis, Borden cost-justified a discount to A&P and Jewel 8¼% *greater* than that given Schubert, whereas the actual difference was only 3%.

The second of these alternative tabulations is that headed "Application of Summary Schedule No. III to Schubert." Here the first two columns are copied from columns 2 and 7 of Summary Schedule No. III, while the third column is a computation of Schubert's costs based on the same method of allocating indirect delivery costs as that used in Summary Schedule III (R. 605).

The method of allocation employed in Summary Schedule III was to take the indirect costs of delivery (routeman's indirect labor, special delivery indirect labor, and wholesale truck costs), and allocate this on the basis of the number of "stops" or individual deliveries made to the surveyed customers. The use of "stops," "deliveries," or "orders" as the units for allocation purposes is a common and approved accounting practice.

The sense of this will be understood by taking the activity listed in the cost study as item 26: "Driving time on route," which accounted for 50,933 minutes out of the total 156,935 minutes of total indirect route time. This item covers the time required to drive from the edge of the route area to the first customer location, and from one customer location to another. Since 1576 store locations were surveyed, it may be safely assumed that the average time it takes to drive from one store to another is the same without distinction as to class of customer. On this assumption, the

Application of Summary Schedule No. III to Schubert. Cost Justification on the Basis of Direct Costs Plus Indirect Delivery Costs Allocated on the Basis of Number of Deliveries.

	A&P and Jewel	Independent LS 4%	Henry Schubert
Direct Costs			
1. Routemen's direct labor	$ 6,453.52	$1,648.21	$ 47.02
2. Special delivery direct labor	36.66	9.10	2.45
3. Branch office clerical	649.79	107.11	1.34
4. Billing department	356.38	2.56	—
5. Credit department	1.30	.57	—
6. Accounting department	8.25	.82	.01
7. Robert F. White & Company	—	8.52	.11
8. Tabulating department	12.12	3.88	.05
9. Bad debt losses	—	1.90	—
10. Loss on returned products	1,139.20	167.72	2.32
11. Salesmen and solicitors	—	486.92	21.38
12. Total direct costs	$ 8,657.22	$2,437.31	$ 74.68
Indirect Costs			
13. Routemen's indirect labor	2,292.98	674.39	10.46
14. Special delivery indirect labor	137.94	37.61	6.96
15. Wholesale truck costs	1,449.93	425.56	9.24
16. Total indirect delivery costs	$ 3,880.85	$1,137.56	$ 26.66
17. Total direct and indirect sales and delivery cost	$12,538.07	$3,574.87	$101.34
18. Cost Per $100.00 of Sales	$ 6.42	$ 15.43	$ 9.96

"stop" basis of allocation is the practical equivalent of a mileage basis in measuring the distance and the time between delivery stops.

Furthermore, each "stop" represents a "sale" or "order," which in turn is equivalent to an "invoice line." Therefore, a "stop" for allocation purposes is the equivalent of "truck mile," "order," or "invoice line," all of which were recognized by Taggart as proper "service units" for allocation of delivery expense (R. 676).

Using this unit of measure to allocate indirect delivery expense, the tabulation shows that costs of $6.42 per $100 of sales were incurred in selling and delivering to A&P and Jewel, $15.43 per $100 of sales in selling and delivering to the 80 largest independent stores, and $9.96 in selling and delivering to Schubert. These figures show that a discount to A&P and Jewel 3.54% greater than that given Schubert would have been fully cost-justified, whereas the actual difference was only 3%.

A final demonstration of cost-justification as to Schubert is contained in Summary Schedule V, attached to this Brief, which is based on direct costs of sale and delivery plus an allocation of indirect delivery costs on the basis of direct delivery labor costs. The reasonableness of such an allocation method has been already pointed out with respect to the computation based on Summary Schedule II.

In Summary Schedule V, the *direct* costs are the same as those appearing in the tabulation applying the principles of Summary Schedule I to Schubert. Three additional items are added, routeman's indirect labor, special delivery indirect labor, and wholesale truck costs. The first is allocated in proportion to routeman's direct labor; the second is allocated in proportion to special delivery direct labor;

Summary Schedule No. V

Cost Justification Based on Total Delivery Costs and Other Direct Costs.

Item	Delivery Costs	A&P and Jewel	Independent LS 4% Class	Henry Schubert
	Direct Labor			
1.	Routemen's direct labor	$ 6,453.52	$ 1,648.21	$ 47.02
2.	Special Delivery direct labor	36.66	9.10	2.45
3.	*Sub-Total, Direct Labor Costs*	$ 6,490.18	1,657.31	49.47
	Indirect Labor and Wholesale Truck Cost			
4.	Routemen's indirect labor (Allocated in proportion to Item 1 above)	4,605.04	1,176.11	33.55
5.	Special Delivery indirect labor (Allocated in proportion to Item 2 above)	137.21	34.06	9.17
6.	Wholesale Truck Cost (Allocated in proportion to Items 1 and 2 above)	2,843.65	726.15	21.68
7.	*Sub-Total Delivery Costs*	$ 7,585.90	1,936.32	64.40
8.	*Total of Delivery Costs*	$ 14,076.08	$ 3,593.63	$ 113.87
9.	*Sales Value*	$195,262.07	$23,167.35	$1,017.13
10.	*Delivery Cost, Per $100 of Sales*	$ 7.21	$ 15.51	$ 11.20
	Other Direct Costs			
11.	Branch Office Clerical Salaries	649.79	107.11	1.34
12.	Billing Department	356.38	2.56	—
13.	Credit Department	1.30	.57	—
14.	Accounting Department	8.25	.82	.01
15.	Robert F. White & Company	—	8.52	.11
16.	Tabulating Department	12.12	3.88	.05
17.	Bad Debt losses	—	1.90	—
18.	Loss on returned products	1,139.20	167.72	2.32
19.	Salesmen's and solicitors' salaries	—	486.92	21.38
20.	*Sub-Total Other Direct Costs*	$ 2,167.04	$ 780.00	$ 25.21
21.	*Grand Total*	$ 16,243.12	$ 4,373.63	$ 139.08
22.	*Cost Per $100 of Sales*	$ 8.32	$ 18.88	$ 13.67

and the third is allocated on the basis of the routemen's and special delivery direct labor.

Summary Schedule V shows costs per $100 of serving A&P and Jewel of $8.32, costs per $100 of serving the 80 largest independents of $18.88, and costs per $100 of serving Schubert of $13.67.

Based on this analysis, Borden would have been justified on the basis of direct costs and total delivery costs alone to have given A&P and Jewel 5.35% greater discount than was given to Schubert, whereas the actual difference was only 3%.

These facts show that even the largest independent customer could not produce savings which entitled him on any basis of cost analysis to more of a discount than he in fact received. Actually, had Schubert received no more than a 4% discount, the differential would have been more than cost-justified.

In a footnote (Br. 40, fn. 12), the Government argues that the special discounts of 1½ per cent given Schubert, Popik and Cartan should be disregarded for cost-justification purposes because "This extra discount was given the three stores by Borden to meet competition," citing a statement in the Government's Post Trial Brief to the District Court. This statement is as inaccurate as it is irrelevant. Borden did *not* introduce any evidence that the special discounts to Schubert, Popik and Cartan were granted to meet competition because the Government stipulated that these discounts would not be treated as "evidences of a violation of Section 2(a)" (R. 222-3).

But even if Borden had relied in part on an alternative defense of a bona fide meeting of competition, the raising of such a defense does not in any way preclude reliance on a cost-justification defense. The Robinson-Patman Act is

not concerned with why a discount is given, but deals only with the question whether it can be justified on any ground which the Act recognizes.

Since Schubert received a $5\frac{1}{2}$ per cent discount, the differential in favor of A&P and Jewel was only 3 per cent—and that is the only differential which Borden is called upon to justify.

The Government's Brief, as we have seen, makes many assertions as to the costs of delivery to "large independents." (*e.g.*, Br. 21, 22, 24, 25, 29, 46). But the burden is upon the Government to prove that the stipulated facts failed to support the judgment and findings of the District Court; and this the Government cannot do by making assertions which are contrary to the facts collected by the cost study and presented by the bulk exhibits.

Borden, in its Motion to Affirm, pointed out that "It was a simple matter of mathematical computation for the Government to find out . . . whether any one or more large independents produced lower costs of sale and delivery than A&P or Jewel" (p. 28). The Government's Brief seeks to escape the thrust of this argument by charging that Borden is attempting "to surmount . . . deficiencies in its proof of its cost justification defense" (Br. 47, fn. 16). Borden's "cost justification defense" consists of *all* the evidence produced by its cost study. To refer the Government to the evidence produced by Borden in its cost justification defense, and ask that the Government show that the evidence is defective, is *not* an attempt to "surmount deficiencies" in Borden's evidence.

The foregoing analysis of Borden's costs of sale and delivery to Schubert, the largest independent of all, is the complete answer to the Government's repeated assertions that the volume of Schubert's purchases must have

produced economies entitling Schubert to discounts as great as those given A&P and Jewel (See Br. 39-40, 44, fn. 15, and 46).

The analysis of costs in serving Schubert, coupled with the fact that Schubert's volume was by far the largest of the independents, is also the complete answer to the Government's repeated suggestion that other independents were entitled by the volume of their purchases to discounts equal to those of A&P and Jewel (See Br. 24, 25-26, 45, 46-47). The next largest independent had weekly purchases more than 25% lower than Schubert's purchases (*supra,* p. 38). The logical assumption is that it cost Borden proportionally more to sell and deliver to independents purchasing a substantially lesser volume than Schubert. Since the costs of serving Schubert greatly exceeded the per unit costs of serving A&P and Jewel, the inevitable conclusion is that the cost differentials between the other independents and A&P and Jewel were substantially greater.

Thus, the facts about the costs of serving Schubert demonstrate the wholly mythical nature of the Government's contention that the largest independents must have produced economies entitling them to discounts equivalent to those received by A&P and Jewel.

If the Government desired to contend that somehow Borden treated its independent customers unfairly, the Government should have gone to the cost study and produced at least one example to prove the point. This the Government failed to do.

The Borden cost study demonstrated on a customer-by-customer basis that Borden's discounts were in every instance more than justified by substantial cost differences.

CONCLUSION

The District Court expressly found that the Borden cost studies were made "in good faith" and provide an adequate justification for the difference in prices" charged by Borden (R. 570). The District Court also expressly found that Borden's "classification" of its customers was reasonable, although its finding to that effect was stated as an answer to a Government attack and is expressed in a negative form (*ibid.*).

Under Rule 52(a), Federal Rules of Civil Procedure, the burden is upon the Government to show that these findings are "clearly erroneous." As this Court has commented,

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341.

The burden is upon the Government to show either that the record fails to contain facts sufficient to support the findings, or that the record contains facts which destroy the validity of the findings. The Government cannot ignore, as it has done, what the cost study, with its customer-by-customer analysis of the facts, clearly demonstrated.

The Federal Trade Commission, the Courts, and the experts in the field have all agreed that, when detailed cost studies are made in good faith, follow approved accounting methods and principles, and show a justification for the challenged price differentials, they must be accorded "great weight"; *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 394; *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38, 59 (8th Cir. 1951); *Reid* v. *Harper and Brothers*, 235 F.2d 420, 422 (2nd Cir. 1956); Cost Justification Report (R. 773). Such studies should be accepted

unless it is clearly demonstrated that "the principles relied on are not sound." Cost Justification Report (*ibid*).

In the present case, every one of the price differentials is over-justified on the basis of direct costs as well as on the basis of several alternative and approved methods of cost allocation. The amount of over-justification in every instance is very large.

The only attack on the cost study made in this Court relates to the "classification" of A&P and Jewel resulting from the fact that these customers received a greater discount than the independents. But the cost study itself produced a plethora of evidence showing a tremendous difference between the total volume of the purchases of these two customers and all other customers and showing that this difference had to produce and did produce substantial economies which fully justified the granting of the special discounts.

The Government has tried to suggest that this Court should speculate on the facts and conclude that Borden *may* have treated some of its largest independent customers unfairly. Such speculative and unsupported arguments are insufficient to show that the findings below were "clearly erroneous." Borden has not been content to rest its case on this ground. Borden has taken the example upon which the Government bases its arguments—the Schubert store—and has demonstrated that even the unique volume of Schubert's purchases did not produce economies of the magnitude of those produced by A&P and Jewel. Borden demonstrated that the price differences between what Schubert paid and A&P and Jewel paid were far less than the differences in costs of sale and delivery.

We submit once again that the sole issue in this case is one of fact. No issue of statutory interpretation or of legal

principle is present in any form whatsoever. Every argument advanced by the Government finds its answer in the facts of the case.

We submit once again that this appeal presents no substantial issue warranting extensive consideration by this Court and that the judgment of the District Court should be affirmed.

Respectfully submitted,

Stuart S. Ball,
Cecil I. Crouse,
Joseph A. Greaves,
H. Blair White,

Counsel for Appellee,
The Borden Company.

Week Starting 7/11/53 Ending 7/17/53

Prepared By E. E. Wilson

Routeman's Name J. A. Geng

Truck No. 3221 30.

WHOLESALE ROUTE DELIVERY TIME ANALYSIS
CHICAGO MILK DIVISION

Exhibit II
Page 1 of 2

Check One

31. Independent Store (Single Store whose Management does not Control Another Similar Store) [x]
32. Chain Store (1 of 2 or more Stores Under Same Management) [ ]
33. Miscellaneous (Single Estab. Other than a Store such as Club, Restaurant or Bulk Stop) [ ]

Name Henry Schubert
Certified Park Food
Address 3610 - 71st St.
Cust.No. 261

Description of Operations — Insert Date -	1	2	3	4	5	6	7	Total
	Time in Minutes							
34. Time to Drive From Branch to Edge of Route Area								
35. Mileage From Branch to Edge of Route Area (Show in Tenths, i.e. 1.7)								
36. Time to Drive from Edge of Route Area to 1st Stop (If this is 1st Stop)								
37. Mileage From Edge of Route Area to 1st Stop (If this is 1st Stop)								
38. Time to Drive From Previous Customer Stop (If this is Not 1st Stop) (11)	10	9 (14)	11	[illegible]	9	6 (11)		151
39. Mileage From Previous Customer Stop (If this is Not 1st Stop) (2.3)	2.7	[illegible]	[illegible]	[illegible]	1.5	1.3 (1.8)		29.4
Time Waiting (40) To Park (41) For Store to Open (42) For Loading Platform (Insert appropriate number in small block)	40 (5)	40 (2)	41 1					40 7; 41 1; 42
43. Time Assembling Mdse. to be Delivered to Store	1 (2)	12 (9)	4 (6)	12 (9)	14	15 (11)		89
44. Time Delivering Mdse. to Store	2 (3)	8 (4)	4 (3)	7 (1)	11	7 (5)		55
45. Time Assembling Additional Mdse. to be Delivered to Store	7 (3)							10
46. Time Delivering Additional Mdse. to Store	5 (1)							6
47. Time to Stack & Pack Mdse. in Store Ice Box	9 (6)	11 (12)	8 (18)	9 (24)	26	13 (27)		171
48. No. of Trips from Truck to Ice Box to Complete Delivery Re. in 44 & 46	4 (3)	3 (3)	3 (2)	5 (2)	7	7 (1)		45
49. Time to Collect and Verify Returned Mdse. in Store	3	(1)	(1)					5
50. Time to Collect and Verify Empty Bottle Returns	(6)	(4)	(2)	(3)	3	(8)		25
51. Time to Prepare Sales Ticket	1 (4)	2 (1)	1 (6)	2 (9)	17	2 (5)		50
Time to (52) Secure COD (53) Collect Credit Pay't. (54) Customers Signature (Insert Appropriate Number in small block)	52 6 (16)	52 2 (14)	52 5 (1)	52 3 (10)	52 20	52 3 (4)		52 89; 53; 54
55. Time to Remove Returned Mdse. from Store to Truck								
56. Time to Stack Returned Mdse. in Truck								
57. Time to Remove Empty Bottles from Store to Truck	5 (4)	(6)	(2)	1	2	(3)		28
58. Time to Stack Returned Bottles in Truck	2 (4)	1 (4)	1 (4)	1 (3)	2	(3)		25
Time to Further Service Cust. (59) Sales Promotion (60) Complaints (61) Gen. Conv. (Insert appropriate number in small block)					61 1			59; 60; 61 1
62. Time to Enter Delivery in Route Book	1 (1)	1 (1)	2 (3)	3 (1)	6	2 (1)		22
63. Time for Other Purposes (Specify Reason) Call [illegible]	(4)	(3)	(5)	(4)		(6)		22
64. Time from Last Stop to Branch (If this is Last Stop)								
65. Mileage from Last Stop to Edge of Route Area (If this is Last Stop)								
66. Mileage from Edge of Route Area to Branch (If this is Last Stop)								
Grand Totals - All Lines	138.9	150.7	126.4	137.8	119.5	158.1		831.4
Total Minutes-Lines 34, 36, 38, 40 through 47, 49 through 64	127	138	115	124	111	142		757
Total Mileage-Lines 35, 37, 39, 65, & 66	4.9	6.7	1.4	6.8	1.5	3.1		29.4
Total Trips, Line 48	7	6	5	7	7	13		45
Total Minutes, Miles & Trips (Must Agree with Grand Totals Above)	138.9	150.7	126.4	137.8	119.5	158.1		831.4

67. Number of Stops (No. of Times within Week that Routeman Called on Store) 11
68. Days Served (No. of Days within Week that Routeman Called on Store 6

Miscellaneous (Place check mark of figure where appropriate. **ANSWER ALL ITEMS**)

Item Wall Display Installed 69 Yes [ ] 70 No [X]
Neon Sign Installed 71 Yes [ ] 72 No [X]
Window Display Installed 73 Yes [ ] 74 No [X]

75. Number of Feet From Truck Unloading Point to Store Entrance Used 15 Feet
76. Number of Feet From Store Entrance used to Ice Box 20 + 50 Feet

Floor Level on which Store is Located 77 Basement [ ] 78 Ground Floor [X] 79 Second Floor [ ]
Type of Ice Box Used 80 Display Case [X] 81 Walk in Cooler [X] 82 Regular Ice Box [ ]
Is this a Split Stop (Also Served by Another Milk Co.) 83 Yes [X] 84 No [ ]

85. Distance to Nearest A & P Store (If this is not an A & P Store) 7 City Blocks
86. Distance to Nearest Jewel Store (If this is not a Jewel Store) 10 City Blocks
87. Distance to Nearest Chain Store Other Than A & P or Jewel 5 City Blocks 88 Name of Chain Nat'l

How is Mdse. Delivered to This Store Handled:

89. Manually
90. Hand Truck
91. Dolly
92. Other (Specify)

Indicate on the Diagram Below the Locations of the Entrance to this Store, and that of the Ice Box. Use an "E" (93) for Entrance Location and an "X" (94) for Box Location.

95. What is the greatest width at any Point in the Aisle or Aisles used Proceeding from the Store Entrance to Ice Box 6 Feet

96. What is the Narrowest Width at any Point in the Aisle or Aisles Used Proceeding from the Store Entrance to Ice Box 3 Feet

F	E 1	2	3	4	5	6	7	8	9	10	11	~~12~~
R	13	14	15	16	17 X	18	19	20	21	22	23	24
O	25	26	27	28	29	30	31	32	33	34	35	36
N	37	38	39	40	41	42	43	44	45	46	47	48
T	49	50	51	52	53	54	55	56	57	58	59	60

Instructions: The above data is to be recorded for each store on each route each day. If delivery is made to more than one store without moving the vehicle, record the time elements under description of operations for each store separately.

If more than one stop is made at one store in one day enter the time elements for each stop separately under description of operations and circle the figures covering the second stop.

DAILY SALES RECORD

Relative to Wholesale Route Survey - Chicago Milk Division

Exhibit III
Page 1 of 2

Branch Englewood
Week Starting 7/11 Ending 7/16
Prepared By E. E. Wilson
97. Route Number 181
Routeman Name J. A. Kinney

Name Henry Schubert (Park Food) [Certified]
Address 2610 - W. 71st St
98. Customer Number 261

Check One

99. Independent Store (A single store whose Management does not control another similar store) ☒
100. Chain Store (1 of 2 or more stores under same Management) ☐
101. Miscellaneous (single establishment other than a store such as Club, Restaurant or Bulk Stop) ☐

Product	Size	Sales Sun. Gl	Sales Sun. Pa	Sales Mon. Gl	Sales Mon. Pa	Sales Tues. Gl	Sales Tues. Pa	Sales Wed. Gl	Sales Wed. Pa	Sales Thur. Gl	Sales Thur. Pa	Sales Fri. Gl	Sales Fri. Pa	Sales Sat. Gl	Sales Sat. Pa	Sales Total Gl	Sales Total Pa	Returns Sun. Gl	Returns Sun. Pa	Returns Mon. Gl	Returns Mon. Pa	Returns Tues. Gl	Returns Tues. Pa	Returns Wed. Gl	Returns Wed. Pa	Returns Thur. Gl	Returns Thur. Pa	Returns Fri. Gl	Returns Fri. Pa	Returns Sat. Gl	Returns Sat. Pa	Returns Total Gl	Returns Total Pa
102. Homo. or V.D.	Qts.				72		96		100		155		144		265		[illegible]				4		2				[illegible]				[illegible]		11
103. " "	½ Gal.				56		104		47		61		96		108		[illegible]																
104. " "	Gal.			17	[illegible]	44		25		28		36		57		207				1												1	
105. " "	Pts.																																
106. " "	1/3 Qts.																																
107. " "	½ Pts.																																
108. Fortified Skim	½ Gals																																
109. " "	Qts.				15		14		9		10		12		16		[illegible]																
110. Half & Half	Pts.						17		40		33		70		86		[illegible]						15										15
111. " "	Gal.																																
112. Triple Whip	Gal.																																
113. Super Whip																																	
115. " Cream	Qts.																																
116. " "	½ Pts.				4		2		3		3		3		6		21						2										2
117. Cream	Gal.																																
118. "	Qts.																																
119. "	Pts.																																
120. "	½ Pts.				2		1		1				3				7				1												1
121. Sour Cream	12 Oz.				4		4		1		13		21		6		[illegible]																
122. " "	8 Oz.						10		8		11		32		15		[illegible]																
123. Chocolate	Qts.				9		4		3		72		72		38		[illegible]																
124. "	1/3 Qts.																																
125. "	½ Pts.																																
126. Buttermilk	Qts.				28		14		18		17		24		39		[illegible]																
127. "	1/3 Qts.																																
128. "	½ Pts.																																
129. Cottage Cheese	16 Oz.				57		[illegible]		6		21		44		33		[illegible]				1												1
130. " "	12 Oz.				6		2		4		2		4		10		28																
131. " "	8 Oz.				12		2		3		25		45		18		105																
132. " "	9 Oz.																																

Product	Size	Sales Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total	
		Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa
133. Dry Curd Cheese	12 Oz.										4		3				7
134. Cottage Cheese	3 Lb.																
135. " "	5 Lb.																
136. Bakers Cheese	5 Lb.																
137. Egg Nog	Qts.																
138. Butter	Lbs.																
139. Eggs	Doz.																
140. [illegible] Whip																	
[illegible]				2		2										2	2
[illegible]				[illegible]	28		12		6		48		2		15		11
5 [illegible]											8	12		4		16	8
142. Dollar Totals				77.71		134.94		[illegible]		130.89		[illegible]		214.74		[illegible]	
143. Point Value				330		706		[illegible]		616		[illegible]		1013		[illegible]	

Product	Size	Returns Sun.		Mon.		Tues.		Wed.		Thur.		Fri.		Sat.		Total	
		Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa	Gl	Pa.
133. Dry Curd Cheese	12 Oz.																
134. Cottage Cheese	3 Lb.																
135. " "	5 Lb.																
136. Bakers Cheese	5 Lb.																
137. Egg Nog	Qts.																
138. Butter	Lbs.																
139. Eggs	Doz.																
140. [illegible] Whip																	
142. Dollar Totals																	
143. Point Value																	

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